# In the Supreme Court of the United States

OCTOBER TERM, 1971

**No. 71-130**

PACIFIC WESTBOUND CONFERENCE and
FAR EAST CONFERENCE,

*Petitioners,*

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA, CARNATION COMPANY, BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS and THE PORT OF NEW YORK AUTHORITY,

*Respondents.*

## Brief of Carnation Company Opposing Petition for Certiorari

Respondent Carnation Company, opposing the issuance of the writ of certiorari petitioned for, respectfully shows:

### WHY THE CAUSE SHOULD NOT BE REVIEWED

The petition fails to show a case that falls within Rule 19 or to show any special or important or any reason for review by this Court.

**The Rule-making Claim**

The first two questions said to be presented and the matters urged in this connection come to this: The Federal Maritime Commission decision in its Docket No. 872 (affirmed by the Court of Appeals decision here sought to be reviewed) deprived the petitioners (and their members) of the exemption from the antitrust laws under Shipping Act of 1916 § 15, not by the decisional (quasi-judicial) process of construing FMC Agreement No. 8200 as not authorizing the agreements for the "initiative" and "concurrence" rules for rate making but by a process of setting up and making retroactive a new rule (standard) without complying with the Administrative Procedures Act for rule-making. There are two short answers: (1) The Commission did not set up a rule and (2) it is not open to the petitioners to claim that it did.

The respondents entered into and carried out two agreements affecting the making of rates by their members,—the setting up of an "initiative" list of commodities and the agreement that neither conference would change the rates for any commodity not on its initiative list without the concurrence of the other conference,—without submitting these agreements for approval or approval of them under Shipping Act, 1916, § 15 (46 USC § 814). These were not agreements for *jointly agreeing* on rates,—the petitioners always claimed and the Court below held that this was provided for in Agreement No. 8200,—but gave each conference a veto power over any change by the other of its own rates so that it could be bound to a rate with which it no longer agreed, as in this very case with PWC and the increased rate on evaporated milk. From the beginning of the Commission's inquiry in its Docket No. 872[1] through its decision, one of the issues was "Did Agreement No. 8200 authorize the conference to make a side agreement for this veto power?" The Commission decided "no" *as a matter*

1. The holding was responsive to the inquiry whether No. 8200 "is a true and complete agreement between the parties". The Report of the Commission say this is the "first issue". The holding was that it was not; that outside of it were the agreements for "initiative" and "concurrence" not authorized by it.

*of construction of Agreement No. 8200.* It was not rule-making. The determination of the Commission was:

> "Thus we hold that the supplementary agreements relating to the rate-making initiative * * * * the concurrence procedures * * * are without sanction in the basic Agreement No. 8200 * * *"[2]

The determination of the Court was that "we agree with the Commission that the supplementary agreements are without sanction" i.e. in Agreement No. 8200. The Court made the very distinction between an agreement allowing joint rate making and one surrendering the right of independent action which Congress made in the 1961 amendment of § 15 of the Shipping Act, 1916.

It is not open to petitioners to claim that the Commission was doing any general rule-making. The Commission action was brought to the Court of Appeals for the Fifth Circuit for review under the Review Act of 1950 § 4 (5 USC § 1034), replaced by Pub. Law 89-554 (28 USC § 2344). Both provided that review should be on petition and that the petition should state, among other things, "the grounds on which relief is sought". The petition in this case (set out in Appendix A hereto) did not state as a ground for relief that the Commission action had been rule-making without compliance with the Administrative Procedure Act. No such question was before the Court of Appeals or decided by it or can now be urged as a ground for finding that it was in error.

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2. The Petitioners, correctly, in their petition to review the Commission's decision (see App. A, hereto, Part III, par. 1 and 2) took the position that the Commission, in its original Report, held "initiative" and "concurrence" were not authorized by Agreement No. 8200, *without* any holding that No. 8200 did not authorize joint rate-making and that the holding that No. 8200 did not authorize joint rate-making came only with the "clarification" of November 1, 1965 *"contrary* to the Opinion and Order as originally issued on July 30, 1964". The Report shows that the Examiner found that there were these *supplementary* agreements, that the conferences excepted and argued they "are within the contemplation of the joint agreement" and the Commission said "We disagree with respondents". It held that under earlier Commission decisions they did not constitute "routine actions" or "day-to-day interstitial workings under the agreement" which did not require separate filing and approval.

**Remand for Redetermination**

There was no occasion to remand to the Commission to again determine what it already had determined,—to make a decision which already had been so made that all the Court of Appeals had to do was agree and affirm. The Commission held that whatever else Agreement No. 8200 did or did not do it did not authorize the agreements for the initiative list and concurrence requirement for change of rates on non-initiative items.[2] This was a determination which this Court, *with Agreement No. 8200 and the decision of the Commission before it*, held in *Carnation Company v. Pacific Westbound Conference*, 383 US 213 the Commission could make. If the Commission could make this decision under Agreement No. 8200 the Court of Appeals, if it agreed, could affirm.[3] The Court of Appeals, having determined as matter of law,—as a matter of construction,—that Agreement No. 8200 allowed joint rate making but not an agreement depriving each conference of the power of independent action on non-initiative items, could not remand so that the Commission could disregard this holding and make a different determination.

**Modification of Agreements Nos. 17 and 57**

Finally, as an independent ground for holding that the agreements for the initiation list and "concurrence", until filed and approved, were illegal under Shipping Act of 1916, § 15 the Court held that complete control over the rates of their members was given to each conference by their "organic conference agreements", FMC Agreements Nos. 57 and 17, and that the supplementary initiative and concurrence agreements, without Commission approval, unlawfully affect their organic agreements, — deprive each conference of the right of independent action given to it by its own organic agreement. This is sufficient to sustain the Commission holding that the supplementary agreements were "modifications", required filing and approval to be lawful (Shipping Act, 1916, § 15 par. 1) and were unlawful under § 15 with-

3. Indeed, under *Consolo v. FMC*, 383 US 607, was required to affirm.

out this. The petition does not in any form attempt to deal with this separate and sufficient ground for the Court's holding.

## STATEMENT OF THE CASE

The petition's statement is inadequate.

The material for the statement of the case appears in the record herein of the Court of Appeals for the Fifth Circuit and in the record of this Court in *Carnation Company v. Pacific Westbound Conference,* 383 US 213, Oct. Term, 1965, No. 20. These are interdependent cases, part of the same controversy. Under the doctrine of "primary jurisdiction" and the decision in *Carnation Company v. Pacific Westbound Conference,* 383 US 213, above, this case is a part of the action which this Court in *Carnation* remanded to the District Court for trial after conclusion of this case.

The petitioning "conferences are associations of shipping companies that *establish rates for their respective members* pursuant to agreements approved by the Federal Maritime Commission[4]" (*Carnation,* 383 US 213, 215), Agreement No. 57 for Pacific Westbound Conference (PWC) whose members served the Far East from the West Coast and No. 17 for Far East Conference (FEC) whose members served the Far East in a competing trade from the Atlantic and Gulf Coasts. On November 5, 1952 the members of these conferences entered into FMC Agreement No. 8200 which was approved by the Commission on December 29, 1952.[5] Thereafter, in May 1955 and May 1956, the conferences entered into supplementary agreements setting up an "initiative list" of items for each conference on which that conference, acting alone under its organic Agreement No. 17 or No. 57, could fix,—raise or lower,—rates and agreeing that the rates on items *not* on its initiative list could not be changed by one conference acting alone for its members under its organic agreement but

4. References to the Commission include its predecessors.

5. Called in *Carnation,* 383 US 213, 223 fn 6 "the 1952 agreement for consultation" and held by the Court below to authorize the two conferences to act jointly and agree on rates.

could be changed by one conference for its members only with the concurrence of the other conference.[6]

Effective May 1, 1957 the PWC rate for evaporated milk from the West Coast to the Philippine Islands was increased by $2.50 per ton. Carnation Company was a shipper of evaporated milk to the Philippines from the West Coast. In November 1957 it requested PWC to return to the old rate by reducing the rate by $2.50. PWC, as the petition states (p. 5), voted to grant the request but since it did not have the initiative on evaporated milk, agreeably to the 1955 and 1956 supplementary agreements, it requested the concurrence of FEC. Concurrence was declined by FEC, PWC submitted to this veto and, accordingly, Carnation's request was declined by PWC which represented to Carnation that this was the decision of "the members of this Conference".[7]

On October 26, 1959 the Commission, on its own motion, instituted its Docket No. 872 an investigation, among other things, into "whether said Agreement No. 8200 is a true and complete agreement of the parties". Carnation's petition to intervene was granted September 8, 1960. In the course of the investigation Carnation learned about the supplementary agreements for the initiative list and concurrence and the real reason why its request of November 1957 for the removal of the increase in the rate on evaporated milk to the Philippines had been declined by PWC. On the basis of what it learned it, on December 5, 1962, instituted its action under the antitrust laws in the United States District Court for the Northern District of California, So. Div., No. 41153, against PWC, FEC and their members which so far has resulted in this Court's decision in *Carnation Company v. Pacific Westbound Conference,* 383 US 213, 932.

Meanwhile on October 3, 1961 Shipping Act, 1916, § 15 had been amended to make clear the distinction between, and the

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6. See petition p. 4 fn 5. There was provision that if one conference changed the other could also change in order to maintain a prior differential but this case is not concerned with such changes.

7. It would seem that this misstatement was inspired by the secrecy agreement to which the Court below refers in its opinion.

different treatment that should be accorded to, agreements between conferences to agree on rates and agreements which go beyond this and give one conference a veto power over rates of another conference and so deprive a conference of the right of independent action. The amendment provided (among other things) that no agreement between conferences should be approved unless each conference "retains the right of independent action". This is a Congressional determination of the difference between an agreement that parties *can* act jointly in fixing rates and one which prohibits a conference from acting alone and requires that conferences *must* act jointly.

Carnation, in its action for damages against the conferences and their members, No. 41153, set out the nature of the traffic involved, the formation of the conferences and the function of PWC under its organic Agreement No. 57 in fixing rates for its own members, the making of Agreement No. 8200 and the later making of the secret supplementary and unapproved agreements for the initiative list and the necessity for concurrence, what it had learned in the proceedings in the Commission's Docket No. 872 and that it had been unlawfully overcharged $2.50 per ton on shipments of evaporated milk as a result of the supplementary initiative list and concurrence agreements which were illegal under the Sherman Act and not exempted because not filed and approved under Shipping Act, 1916, § 15.[8] The issue of illegality because of non-approval was clearly tendered. Equally clearly if the supplementary agreements were exempt from the Sherman Act for any reason Carnation had no case and dismissal was proper.

The Commission learned of Carnation's action No. 41153, intervened and, with the defendants, moved to dismiss. It presented, in support of its motion, Carnation's intervention in

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8. The complaint was before the Court in *Carnation*, 383 US 213 and the holding of this Court was that it was sufficient to charge violation of the antitrust laws. The petition here (pp. 6, 7) concedes that this Court held a claim for relief was stated unless an exemption under § 15 could be found.

Docket No. 872 and *Agreement No. 8200 in full text*. It is beyond question that from then on the Commission's proceedings in Docket No. 872 and the Courts' proceedings in *Carnation Company v. Pacific Westbound Conference* were in full view of each other. It is beyond question that when this Court decided *Carnation*, 383 US 213 and 932 it had Agreement No. 8200 and the supplementary agreements before it.

The District Court granted the motions and dismissed. Carnation appealed to the Court of Appeals for the Ninth Circuit. Before that appeal was determined the Initial Decision of the Examiner in Docket No. 872 was rendered. It was called to the attention of the Court of Appeals for the Ninth Circuit and was referred to in the Court's opinion (336 F2d 650). The Court noticed that if the Commission ruled in favor of the action taken by the conferences "no antitrust proceedings would be in order." It affirmed the dismissal.

After the decision of the Court of Appeals the Commission decided Docket No. 872. In making its decision it had before it the Court of Appeals' decision. That decision is referred to in the opinion of Commissioner Patterson.

This Court granted certiorari to review the decision of the Court of Appeals for the Ninth Circuit. The decision of the Commission in Docket No. 872 and its decision of November 1, 1965 on petitions for clarification, both had been rendered before *Carnation Co. v. PWC* was argued in this Court and both were before it when it rendered its decision. The opinion of Mr. Chief Justice Warren specially refers to what the Commission decided (p. 223); that the FMC had "concluded that its approval of respondents' 1952 agreement [No. 8200] did not cover the implementation of the subsequent agreements which are the basis of petitioner's treble-damage complaint." Agreement No. 8200 in full text was before this Court and the reversal of dismissal of Carnation's action, at the least, is a holding that *so far as the terms of No. 8200 are concerned* they did *not* preclude the FMC ruling as to the subsequent agreements; that it could be held, as the

Court of Appeals for the Fifth Circuit held, that the *terms of No. 8200* did not authorize the supplementary veto arrangement.

Neither the Commission nor the courts were under any misapprehension as to what was going on. When this Court reversed the Ninth Circuit it necessarily held that under the terms of No. 8200 as matter of law the Commission could decide as it did decide; that the terms of No. 8200 did not authorize the supplementary agreements because if No. 8200 authorized them they were exempt, Carnation's complaint did not state a claim, its antitrust action could not be sustained and the Court of Appeals and District Court should have been affirmed, not reversed. It did no remand for trial, as it at first stated should be done, because after its opinion was filed it learned of the proceedings for review and directed that the case be held until the Commission's decision was final. Since the Court below affirmed, there is nothing further for the Commission to do.

## CONCLUSION

There is nothing to the attempted point that the Commission having decided specific issues raised by contending parties, in a proceeding that as to these issues had become adversary, it was exercising rule-making power.

This Court has in substance already decided that the Court of Appeals could affirm the Commission.

The supplementary agreements were unapproved modifications of the conferences' organic agreements and unlawful under the plain wording of Shipping Act, 1916, § 15.

It is respectfully submitted that the petition should be denied.

San Francisco, California, August 16, 1971.

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*Carnation Company*

## *Appendix A*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT[1]

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| Pacific Westbound Conference and Far East Conference,<br>Petitioners,<br>v.<br>United States of America and Federal Maritime Commission,<br>Respondents. | No. 20634 |

### PETITION FOR REVIEW

Pacific Westbound Conference (PWC) and its members lines, and Far East Conference (FEC) and its member lines, petition this Court to review an Opinion and Order of the Federal Maritime Commission dated July 28, 1965 as "clarified" and made final by the Commission on November 1, 1965. Said Opinion and Order is entitled, "Docket No. 872, Joint Agreement between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference". A true copy of said Opinion and Order is attached to this Petition as Exhibit A,[2] and a true copy of said "clarification" to the Opinion is attached as Exhibit B.[2] Said Opinion and Order is directed against petitioners and their member lines.

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1. Transferred to the Court of Appeals of the Fifth Circuit on application of the Federal Maritime Commission agreeably to 28 USC § 2112 (a).

2. Omitted here. They appear in the printed record of the Court of Appeals at pp. 92 and 174 and the Commission's original Report and the opinion of Commissioner Patterson are in Appendix A to the Petition for Certiorari.

I. *Jurisdiction and Venue*

This Court has jurisdiction to review this Report and Order of the Commission pursuant to Section 2 of the judicial Review Act of 1950 (5 U.S.C.A. § 1032). Venue is in this Court under Section 3 of said Act (5 U.S.C.A. § 1033).

II. *Nature of the Proceedings*

1. The instant Opinion and Order of the Commission was issued after an investigation instituted by the Commission's predecessor, the Federal Maritime Board. on October 26, 1959 (Docket No. 872). That order of investigation recited that PWC's and FEC's member lines had entered into an agreement (No. 8200) approved by the Board under Section 15 of the Shipping Act, 1916, (46 U.S.C. § 814). The Order further recited that the parties "pursuant to that agreement act jointly for the purpose of establishing the rates and rules and regulations relating to the transportation by them. . . ." The purpose of the investigation was to "determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of [Section 15 of the Shipping Act, 1916]." or whether, on the other hand, there were subsidiary unfiled agreements between the parties that should have been filed with the Commission.

2. Agreement 8200, which was introduced as an exhibit in the investigation, provided that the purpose to be accomplished thereby was to assure stability of ocean rates to the Far East from the East and West Coasts of the United States. The parties agreed that "it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates. . . ."

3. On August 30, 1963 the Commission's Presiding Examiner issued his opinion and recommended decision. This decision in no way questioned the right of the parties to the Agreement 8200 to act jointly in the making of ocean freight rates. The entire discussion and decision concerned the "rules and regulations", adopted pursuant to Agreement 8200 by the parties, that dealt with the

manner and procedure under which the parties would agree on rates. The Examiner concluded that certain of these rules and regulations should have been filed separately with the Commission as agreements subject to Section 15 of the Act.

4. On July 30, 1964, this Court, in an opinion by Judge Pope rendered in an appeal in a civil action concerning this same Agreement 8200, twice stated that Agreement 8200 as approved by the Federal Maritime Board obviously authorized the parties to the agreement to act jointly (i.e., agree on) in fixing ocean rates. The Court stated:

> "It is plain that the arrangement provided for by agreement No. 8200 contemplated joint action in the establishment of rates. It recited that for the accomplishment of the purpose of this agreement 'it is essential that the parties shall, from time to time, establish the rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates.'
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> * * * * *
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> "We have noted that it [Agreement No. 8200] expressly provided for and obviously contemplated the establishment of rates by agreements between both conferences. This approved agreement expressly provided that rates should be determined only by a concurrence of the two conferences each acting as a group and in accordance with the procedures prescribed by its conference agreement with respect to the establishment or change of rates."
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> (*Carnation Company v. Pacific Westbound Conference*, 336 F.2d 650 at 665 (1964))

5. On July 28, 1965, the Commission issued its Order and Opinion in Docket No. 872. The Commission held:

> "that the various supplementary agreements affecting overland rates, the concurrence procedures, and the placement of items on the initiative list, constitute unapproved agreements which should have been filed with us for action pursuant to section 15; and not having been so filed and approved the parties to Agreement No. 8200 are hereby ordered to cease and desist from carrying them out;" (Exhibit A, p. 17)

The Commission did not appear to question the rights of the parties to Agreement 8200 to act jointly in making ocean rates. To the contrary, it stated:

> "By the terms of the agreement, the parties thereto agree to establish from time to time 'rates to be charged for the transportation of commodities, and the rules and regulations governing the application of said rates,' . . . . The agreement further stipulates the procedures for subsequent meeting or inter-conference interchanges of information to accomplish the objectives of the agreement." (Exhibit A, p. 2)

At these later meetings, the Commission found, the parties entered into the "supplemental" agreements which had, according to the Commission, not been filed pursuant to Section 15.

6. On November 1, 1965 the Commission "clarified" its Opinion and Order in Docket 872 as follows:

> ". . . there exists no approved agreement which permits joint rate action between PWC and FEC". (Exhibit B, p. 3)

Petitioners hereby seek judicial review of the Commission's determination that Agreement 8200 as approved by the Federal Maritime Board did not permit any form of joint rate action between PWC and FEC members.

III. *Grounds on Which Relief Is Sought*

Relief is sought from the Opinion and Order of the Commission as "clarified" as it relates to the right of the parties to take joint rate action on the grounds that:

1. The Commission's Opinion and Order as "clarified" are manifestly in error and contrary to the plain meaning of Agreement 8200, insofar as the Commission determined that Agreement 8200 does not authorize PWC and FEC members to act jointly in making ocean rates.

2. The Opinion and Order as "clarified" are contrary to the interpretation placed on Agreement 8200 by this Court in *Carnation Company v. Pacific Westbound Conference,* 336 F. 2d 650 (1964), contrary to the Opinion and Order as originally issued on July 30, 1964, and contrary to the opinion of the Presiding

Examiner. No evidence is cited by the Commission for this radical change of position other than its previous discussion in its Opinion and Order of July 30, 1964, and the wording of Agreement 8200 itself.

3. The Opinion and Order erroneously held that approved Agreement 8200 could not be lawfully carried out except following approval of the procedures adopted by the parties.

IV. *Relief Prayed*

WHEREFORE, petitioners pray that this Court enter an order:

1. Reversing the Opinion and Order entered by the Commission in Docket 872 insofar as it determines that Agreement 8200 does not authorize PWC and FEC members to act jointly in making ocean rates.

2. Suspending and enjoining the enforcement of said Opinion and Order insofar as it prevents petitioners from acting jointly in fixing ocean rates.

3. Granting to petitioners such other and further relief as the Court may deem appropriate.

Dated at San Francisco, California, this 30th day of December 1965.

Respectfully submitted,

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